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COLLATERAL ATTACK UPON JUDGMENTS ON THE GROUND OF FRAUD.

While it is not the purpose of this article to consider or discuss the fundamental bases of the law, the inquiry here being directed to a rather narrow and superficial question, it is nevertheless interesting to trace the development of fundamentals, through their application to ever increasingly complicated states of fact, into fine spun distinctions. The wit and humor of bench and bar often lend a key which unlocks the door of mystery. It is sometimes said that courts are places where justice is dispensed with. The jest derives its poignancy from the fact that the universality of the law does not always work justice between individual litigants.

Nevertheless, behind the doctrines of the common law are the fundamental principles of justice. Where two or more great underlying rules of justice may be applied to a state of facts in such way as to produce contrary results, fine spun distinctions arise. Such hair splittings we are here to consider. It may be well to begin by examining the causes out of which they arise.

It is one of the fundamental principles of justice that questions once litigated should be forever at rest. *Stare decisis.* The principle commonly spoken of as "*res adjudicata*" is but an outgrowth of this underlying rule. "*Interest republicae ut*

sit finis litem." On the other hand it is no less fundamental that no man should be allowed to take advantage of his own fraud. But no sooner are these two principles brought into juxtaposition than trouble begins. Suppose a man secures an adjudication by fraud. Which principle is to govern? Shall the resolution of the law be that the judgment must stand because it is a thing adjudicated or must the very decision be declared void, because tainted with fraud? If the first conclusion is reached, a man may take advantage of his own fraud. If the second, the principle of *res adjudicata* must admit of exceptions.

These considerations make it natural that we should find not only loose language in ill considered cases, but also erroneous applications of the principles properly applicable to the facts. It at once becomes essential that we should define our subject with greatest care, for it is because of not keeping the definition in mind, that decisions have been erroneous.

It must needs be noticed that to permit a direct attack upon a judgment in no way affects the principle of *res adjudicata*, for the judgment is not, properly speaking, final until every direct mode of obtaining a different result has been exhausted.

The decision of any court which has assumed the form of a final judgment may be attacked in two ways. It is possible by steps taken in the very proceeding to set it aside by motion for a new trial, appeal, or writ of error, or by motion to open or to strike off the judgment. It is possible to plead or prove the invalidity of the judgment in question, when its bar or its enforcement are material in some other proceeding. We are here concerned with collateral attack. The term is defined in *Morrill v. Morrill*¹ as follows: "A collateral attack on a judgment is any proceeding which is not instituted for the express purpose of annulling, correcting or modifying such decree."²

¹ 20 Ore. 96 (1890).

² For example, in *Morris v. Travellers Insurance Company*, 189 Fed. 211 (1911), A, by his father and next friend, brought suit against B, and a settlement was affected and a judgment for A entered and satisfied. Then A sued the liability insurance company, alleging fraud in the prior judgment. Held, this was a collateral attack. In *Rheno v. Emery*, 65 Fed. 826 (Ohio 1895), one of several heirs sought to hold the others for fraud in having the lands

Such an attack upon a judgment is a collateral attack for the cogent reason that it is not a direct attack. When we realize the simple force of the definition we are amazed to find solemn decisions, so wholly oblivious to common sense, are unworthy on a judgment on the ground of fraud is a direct attack.³ Such decisions, so wholly oblivious of common sense, are unworthy of more than passing notice. Whether an attack on a judgment is direct or collateral depends solely upon whether the proceedings in which the attack is made is solely for the purpose of attacking the judgment questioned. The reason for the attack can, in the nature of things, have nothing to do with it. It is obvious that such decisions are rendered because the rules of law applicable to the facts seemed to be in conflict with the justice of the particular case and the judges are led, by a desire to see justice done between the parties, into an absurdity.

A collateral attack upon a judgment can be made either at law or in equity but the definition we have given to the phrase makes it clear that equitable relief against a judgment should not be confused with a collateral attack upon it. Moreover, equitable relief is not direct attack, for in the former case it is because the validity of the judgment is recognized that relief is granted, whereas the purpose of the latter is a declaration of the nullity of the judgment.⁴

of the estate sold under a decree of court. *Held*, this was a collateral attack upon the decree of sale.

³ *Corwin v. Toole*, 31 Iowa 513 (1871); *Whetstone v. Whetstone*, 31 Iowa 276 (1871); *Kirby v. Kirby*, 142 Ind. 419 (1895); *Collerell v. Koon*, 151 Ind. 182 (1898), and in *Saunders v. Brice*, 56 S. C. 1 (1899), it was said that an attack on a judgment on the ground that the attorney had no authority was not a collateral attack.

⁴ The following cases are frequently cited as cases of collateral attack and must, therefore, be mentioned here. Every one of them is a case of equitable relief, every one recognizes the judgment against which relief is sought. *Robinson v. Davis*, 11 N. J. Eq. 302 (1897); *Boston v. Sparhawk*, 1 Allen 448 (Mass. 1861); *Clover v. Flowers*, 101 N. C. 134 (1888); *Thomas v. Ireland*, 88 Ky. 581 (1889); *Baker v. Byrn*, 89 Hun 115 (N. Y. 1895); *Wilson v. Williams*, 115 Ga. 472 (1902); *Burkhardt v. Stephens*, 117 Mo. App. 425 (1905); *Houser v. Bonnell*, 149 N. C. 52 (1908); *Haldeman v. Dougherty*, 170 Ala. 362 (1911); *French v. Thomas*, 252 Ill. 65 (1911); *De Soto v. Hill*, 65 Sou. 988 (Ala. 1914); *Laun v. Kipp*, 155 Wis. 347 (1914); but see *Smith v. Smith*, 22 Iowa 516 (1847); *Langdon v. Blackburn*, 109 Cal. 19 (1895); *Gilman v. Heitman*, 137 Iowa 336 (1908).

There are two grounds which customarily are assigned for a collateral attack upon a judgment: fraud and want of jurisdiction. The latter usually involves the former but the two are clearly distinguishable. The question of jurisdiction can always be raised. No judgment can be binding if the court which rendered it was without jurisdiction. It is, therefore, necessary to distinguish carefully the cases in which the real ground of the attack is lack of jurisdiction.⁵

Having thus limited our inquiry, we must be on our guard lest the loose expressions to be found in some cases mislead us. Thus, for example, there are cases in which the expression "collateral attack" is used though the proceeding was *scire facias* to revive the judgment attacked. In those states where the procedure to revive a judgment is *scire facias*, it is difficult to understand how such an attack can be called collateral. But an attack on a judgment in a proceeding to revive it, is not, correctly speaking, a collateral attack.⁶

ATTACK BY A PARTY OR A PRIVY.

A judgment may be attacked by a party to it, or by one standing in privity to a party, or, it may be attacked by a total stranger to the record. For the sake of convenience we shall consider first collateral attack by a party or privy.

⁵ Where fraud goes to the jurisdiction the judgment is void, even though regular on its face, *Lucy v. Deas*, 59 Fla. 552 (1910); *Mahoney v. Insurance Company*, 133 Iowa 570 (1907). "The only fraud that can be relied upon to avoid a judgment in a collateral attack is fraud which inheres in the judgment and which affects the jurisdiction," *Weedman v. Fowler*, 84 Kan. 75 (1911). The *dictum* in *Ziemer v. Steel Co.*, 99 N. Y. App. 169 (1904), which appears wholly irreconcilable with the New York cases, is clearly in line when it is considered that the fraud set up removed the jurisdiction of the court. See also *Young v. Wiley*, 107 N. E. 278 (Ind. 1914); *Granger v. Clark*, 22 Me. 128 (1842); *White v. Bedell*, 173 S. W. 624 (Tex. 1915), where the attack was allowed; *Burton v. Perry*, 146 Ill. 71 (1893), where it was said that fraud which affects the jurisdiction can be shown, and *Cody v. Cody*, 98 Wis. 445 (1898), where it was said that unless the fraud goes to the jurisdiction it cannot be shown.

⁶ In *House v. Collins*, 42 Tex. 486 (1875), was a *sci. fa.* to revive, it was held the original judgment could be questioned for fraud. On the other hand, in *Bruno v. Oviatt*, 48 La. Ann. 471 (1896); *Carpentier v. Oakland*, 30 Cal. 439 (1866), and *Granger v. Clark*, 22 Me. 128 (1842), where these cases were suits on judgments, it was held that such a defense could not be raised. *Sherbourne v. Shepard*, 142 Mass. 141 (1886), decides that fraud

There are many decisions stating the broad general rule that it is not permissible for a party or privy to attack a judgment in a collateral proceeding on account of fraud.⁷

An attack for fraud may be based upon matter which appears on the face of the record, or, for matter *dehors* the record. It may be well, therefore, to observe, at this point, that the general principle is open to a very broad exception, namely, that if it appears on the face of the record that a judgment was obtained by fraud, it may be impeached in a collateral proceeding. But this is really not an exception to the general rule; for a judgment which shows on its face that it was obtained by fraud is absolutely void.⁸ It is, therefore, not a judgment, though bearing the form of one, and so to impeach it collaterally, is not, strictly speaking, a collateral attack upon a judgment. To permit impeachment under such circumstances is perfectly consistent with the general rule.⁹

If, on the other hand, the fraud does not appear on the face of the record, the general rule applies.

This general rule should be carefully stated, for it is the basis of our thesis. It has often been expressed thus: "It is a general rule at common law that a judgment of a court having jurisdiction over the subject matter and the parties cannot be

in the taxation of costs is no defense to a *sci. fa.* to revive, while Paxton v. Cobb, 2 La. 137 (1831), holds that fraud in obtaining the judgment may be set up as a defense to an execution, but see Harshman v. Knox Co., 122 U. S. 306 (1887), and Toomey v. Rosansky, 11 Pa. Superior Ct. 506 (1899).

⁷ Logan v. Central Iron Company, 139 Ala. 548 (1903); Bush v. Sheldon, 1 Day 170 (Conn. 1803); Telford v. Barney, 1 Greene 575 (Iowa 1848); Hickey v. Duplantier, 4 La. 314 (1832); Clark v. Colton, 91 Md. 195 (1900); Taylor v. State, 73 Md. 208 (1890); Ellis's Estate, 55 Minn. 401 (1893); State v. Ross, 118 Mo. 23 (1893); Cooper v. Duncan, 58 Mo. App. 5 (1894); Krekler v. Ritter, 62 N. Y. 372 (1875); Rice v. Bruff, 87 Hun 511 (N. Y. 1895); People v. Downing, 4 Sandf. 189 (N. Y. 1850); Bank v. Kern, 8 Dist. 75 (Pa. 1899); Mikeska v. Blum, 63 Tex. 44 (1885); Murchison v. White, 54 Tex. 78 (1880); Rankin v. Hooks, 81 S. W. 1005 (Tex. 1904); Kruegel v. Stewart, 81 S. W. 65 (Tex. 1904); Scudder v. Cox, 35 Tex. Civ. App. 416 (1904); Giddings v. Steele, 28 Tex. 732 (1866); Turner v. Stewart, 51 W. Va. 493 (1902); Kent v. Lake Superior, 144 U. S. 75 (1891); King v. Davis, 137 Fed. 198 (Va. 1903).

⁸ Mahoney v. Insurance Company, 133 Iowa 570 (1907); Friebe v. Elder, 181 Ind. 597 (1913).

⁹ Granger v. Clark, 22 Me. 128 (1842); Carpentier v. Oakland, 30 Cal. 439 (1866); Hart v. Hunter, 52 Tex. Civ. App. 75 (1908). The cases of judgments void on the face of the record are necessarily few.

questioned collaterally for fraud *aliunde* the record, by parties or their privies. After a party has been duly served with process it is his duty to see that the judgment is not fraudulently obtained against him and if it is he must take some proper proceedings to have it annulled."¹⁰ As has been frequently pointed out, the basis of this rule is that the good order and peace of society require that there should be an end to litigation.

The rule thus stated, however, is to be strictly construed. The court must have jurisdiction of the *res* and of the person. The record must be regular on its face. The person seeking to impeach the judgment must be a party to the suit in which it was rendered or privy to such party.

It was in the consideration of this strict application of the rule that the court said in *Mason v. Messinger*,¹¹ "No case ever went so far as to say a judgment could be collaterally attacked for fraud." But even so, the statement is by no means accurate. There are many decisions permitting such attack. The first question, then, is, can these decisions be reconciled and if so upon what theory, and if not, can we segregate the irreconcilable cases so as to pronounce the rule in some jurisdictions to be different from that in others. We must be very careful that the cases which seem to decide that a judgment may be col-

¹⁰ *Homer v. Fish*, 1 Pick. 435 (Mass. 1823); *Callaghan v. Griswold*, 9 Mo. 784 (1846); *White v. Merrit*, 7 N. Y. 352 (1852); *Kelley v. Mize*, 3 Sneed 59 (Tenn. 1855); *Hatch v. de la Garza*, 22 Tex. 176 (1858); *Mason v. Messinger*, 17 Iowa 261 (1864); *Smith v. Smith*, 22 Iowa 516 (1867); *The Acorn*, 2 Abbott U. S. 434—I. Fed. Cas. No. 29 (1870); *Davis v. Davis*, 61 Me. 395 (1873); *New York Central v. Harold*, 65 How. Prac. 89 (N. Y. 1883); *Bryant v. Estabrooke*, 16 Neb. 217 (1884); *Hodgson v. Southern Pacific*, 75 Cal. 642 (1888); *Mannix v. State*, 115 Ind. 245 (1888); *Gainor v. Johnson*, 15 S. W. 246 (Ky. 1891); *Carter v. Roundtree*, 109 N. C. 29 (1891); *Storer v. Lane*, 1 Tex. Civ. App. 250 (1892); *Schultz v. Schultz*, 136 Ind. 323 (1893); *Bowman v. Wilson*, 64 Ill. App. 73 (1895); *Kansas City Railway v. Morgan*, 76 Fed. 429 (1896); *Board of Commissioners v. Platt*, 79 Fed. 567 (1897); *McCambridge v. Walvern*, 88 Md. 378 (1898); *Irwin v. Bexar County*, 63 S. W. 550 (Tex. 1901); *People v. Fogg*, 132 Cal. 289 (1901); *Johnson v. Stebbins*, 167 Mo. 325 (1902); *Oster v. Broe*, 161 Ind. 113 (1903); *Earp v. Minton*, 138 N. C. 202 (1905); *Morris v. Sadler*, 74 Kan. 892 (1906); *Davis v. Muir*, 151 Cal. 318 (1907); *Nelson v. Felsing*, 32 D. C. App. 420 (1909); *Hall v. Hall*, 139 N. Y. App. 120 (1910); *Young v. Wiley*, 107 N. E. 278 (Ind. 1914); *Osborun v. Moss*, 7 Johns. 161 (N. Y. 1810), goes so far as to say parties and privies cannot collaterally attack at all, and so does *Stewart v. Stisher*, 83 Ga. 297 (1889).

¹¹ 17 Iowa 261 (1864).

laterally impeached for fraud really so hold for "there are to be found in the books certain cases in which the courts have used language, sometimes pertinent to the question before them for adjudication and at other times mere *dicta* holding that judgments can be collaterally attacked for fraud."¹² It has been said, indeed, "It is believed that nearly every case will be found exceptional in character, such as fraud apparent on the face of the record, a judgment by confession or a feigned issue or the language used mere *dicta*."¹³ An examination of the authorities will show whether or not this statement is supported.

Domestic Judgments.

It has been said that the test of permissibility of a collateral attack is to be found in the requirement that "the fraud must have been practiced in the very act of obtaining the judgment," but though this theory is supported by some cases¹⁴ it is not helpful. It lends no essential criterion. The question, what is the "very act of obtaining judgment," is susceptible of innumerable answers.

"That fraud vitiates everything, including the judgments and decrees of courts, and that judgments rendered by courts not having jurisdiction are null, are expressions running through all the books it is true."¹⁵ Justice Sanderson, however, explains the proper use of the terms, he thus employs, by saying: "The expressions, however, are but the expressions of abstract truths, and are to be understood in a qualified sense. They mean

¹² *Mason v. Messinger*, 17 Iowa 261 (1864).

¹³ *Ibid.*

¹⁴ *Hardeman v. Donaghey*, 170 Ala. 362 (1911); *De Soto v. Hill*, 65 Sou. 988 (Tex. 1914); *Weedman v. Fowler*, 84 Kan. 75 (1911); *Justice v. Georgia Realty Company*, 109 Va. 366 (1909); *Porter v. Roundtree*, 111 Ga. 369 (1900); *Rice v. Bruff*, 87 Hun 511 (N. Y. 1895).

¹⁵ See *Amador v. Mitchell*, 59 Cal. 168 (1881), at p. 178; *Hallach v. Loft*, 19 Colo. 74 (1893); *Cotterell v. Koon*, 151 Ind. 182 (1898); *Oster v. Broe*, 161 Ind. 113 (1903); *Warthen v. Himstreet*, 112 Iowa 605 (1900); *U. S. v. Throckmorton*, 98 U. S. 61 (1878). In *Mandeville v. Reynolds*, 68 N. Y. 528 (1877), which was a suit upon a domestic judgment, the defendant was allowed to show that the judgment had been satisfied, whereupon plaintiff was permitted to show that the attorneys who entered satisfaction had no authority to do so.

nothing more than that such is the case when fraud and want of jurisdiction has been made to appear in the proper mode and by competent evidence.”¹⁶

What, then, is the proper mode? We can get at this question by the process of elimination. To allege that the judgment in question was obtained by perjured evidence will not suffice,¹⁷ nor will the allegation that the instrument sued upon was obtained by fraud,¹⁸ nor that the judgment was erroneous in law.¹⁹ Therefore, one who could have appealed cannot attack collaterally.²⁰ Actual fraud, not in the consideration, and other than perjury, must be the foundation of the attack. But “it is not every act of bad faith, duplicity or even untruth in procuring a judgment that constitutes such fraud as will authorize a court in a collateral proceeding to hold a judgment fraudulent and void.”²¹

Though it has been said that collateral attacks have been allowed since the time of Lord Coke,²² probably the earliest adjudication of an attack by a party, and the leading case, is *Moses v. Macferlan*.²³ That was a suit by a defendant in the Court of Conscience against the plaintiff therein, because the plaintiff had recovered and collected a judgment on promissory notes endorsed by the defendant to the plaintiff, despite a cove-

¹⁶ In *Carpentier v. Oakland*, 30 Cal. 439 (1866).

¹⁷ *Dunlap v. Glidden*, 31 Me. 435 (1850); *Greene v. Greene*, 2 Gray 361 (Mass. 1854); *Dilling v. Murray*, 6 Ind. 324 (1855); *Carr v. Miner*, 42 Ill. 179 (1866); U. S. v. *Throckmorton*, 98 U. S. 61 (1878); *Burton v. Perry*, 146 Ill. 71 (1893); *Rexford v. Brunswick*, 181 Fed. 462 (N. C. 1910); *Pattison v. Smith*, 94 Ark. 588 (1910); *Crouse v. McVicker*, 207 N. Y. 213 (1912).

¹⁸ *Bush v. Sheldon*, 1 Day 170 (Conn. 1803); *McClees v. Burt*, 5 Met. 198 (Mass. 1842).

¹⁹ *Carr v. Miner*, 42 Ill. 179 (1866); U. S. v. *Throckmorton*, 98 U. S. 61 (1878); *Bonner v. Gorman*, 71 Ark. 480 (1903); *Young v. Wiley*, 107 N. E. 278 (Ind. 1914).

²⁰ *Granger v. Clark*, 22 Me. 128 (1842); *Smith v. Abbott*, 40 Me. 442 (1855); *Davis v. Davis*, 61 Me. 395 (1873); *Bryant v. Estabrooke*, 16 Neb. 217 (1884); *Weiss v. Guerneau*, 109 Ind. 438 (1886); *Cody v. Cody*, 98 Wis. 445 (1898); *Morris v. Sadler*, 74 Kan. 892 (1906); *Weedman v. Fowler*, 84 Kan. 75 (1911); *Crouse v. McVicker*, 207 N. Y. 213 (1912).

²¹ *Obiter*, in *Carr v. Miner*, 42 Ill. 179 (1866).

²² See *Fermor's Case*, 3 Reports, 77a.

²³ 2 *Burrows* 1005 (1760).

nant not to sue. Lord Mansfield said:²⁴ "It is most clear that the merits of a judgment can never be overhaled by an original suit either at law or in equity. Till the judgment is set aside or reversed it is conclusive as to the subject matter of it, to all intents and purposes."

These sentences epitomize the best opinion upon the point. The other cases only elucidate the thoughts which prompted Lord Mansfield's words.

The earliest American case seems to be *Homer v. Fish*.²⁵ In that case, the defendant caused the plaintiff to insure his vessel upon which there was a loss. He sued the plaintiff, and, on the execution, collected the amount of the loss. Then the plaintiff brought an action against the defendant to recover the money so collected upon the ground that the defendant knew there had been a loss when he insured, but concealed the knowledge from the plaintiff and the fraud was not discovered until after the execution was satisfied. It was held that the former judgment was a bar to the action.

*Davis v. Davis*²⁶ was an action of dower based on a decree of divorce. The defendant offered to prove his collusion in obtaining the decree. This was objected to and the objection was sustained. The Supreme Court, on appeal, affirmed this judgment.

The case of *United States v. Throckmorton*²⁷ is particularly well considered and worthy of the most careful thought. One Richardson filed a claim for land in California under a Mexican grant. Finding that he had no evidence to sustain the grant he went to Mexico and persuaded Micheltorena, former Mexican governor of California, to sign and antedate a false document of title and procured the perjured testimony of two witnesses before a commissioner. Richardson then returned and secured a patent for his land. Mr. Justice Miller delivered the opinion of the court. He said in part:

²⁴ At page 1008.

²⁵ 1 Pick. 435 (Mass. 1823).

²⁶ 61 Me. 395 (1873).

²⁷ 98 U. S. 61 (1878).

"There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. There is also no question that many rights originally founded in fraud become . . . no longer open to inquiry in the usual and ordinary methods. . . . If the court has been mistaken in the law there is a remedy by writ of error. If the jury has been mistaken in the facts the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give the appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed. Here again these proceedings are all part of the same suit and the rule framed for the repose of society is not violated.

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practised on him by his opponent, as by keeping him away from court, a false promise of a compromise or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party²⁸ and connives at his defeat; or where the attorney regularly employed corruptly sells out his interests to the other side—these and similar cases, which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and fair hearing. . . . In all these cases and many others which have been examined relief has been granted on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence or for any matter which was actually presented and considered in the judgment assailed. . . .

"There is an old case in South Carolina to the effect that

²⁸ This has been doubted, *Hageman v. Salisbery*, 74 Pa. 280 (1873). But see *Saunders v. Brice*, 56 S. C. 1 (1899), and *Mandeville v. Reynolds*, 68 N. Y. 528 (1877).

fraud in obtaining a bill of sale would justify equitable interference as to the judgment obtained thereon. But I judge it stands almost or quite alone and has no weight as a precedent.”²⁹

*Edgerton v. Edgerton*³⁰ is an unusually well considered case. A sued his wife for divorce and obtained a decree. Then she sued him in another court of the same state for support and offered to show, in rebuttal of the decree, facts *aliunde* the record whereby to impeach it for fraud. The evidence was excluded and it was held that this was not error. Harwood, J., said:

“While there is much conflict relating to certain questions of law concerning judgments, we think it may be safely said to be almost universally settled now, that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same state, by showing facts *aliunde* the record although such facts might be sufficient to impeach the judgment if brought to bear upon it in a proper proceeding.”

In *Bowman v. Wilson*³¹ B gave A a judgment note, which A entered up in Cook County, Illinois. C then brought partition for certain lands held in common by B, C, and several others in Greene County of the same State. A obtained leave to intervene to collect his judgment. B offered to show that the Cook County judgment had been obtained by fraud but the court ruled out the offer. Pleasants, J., said:

“It is truly said, generally, that fraud vitiates everything, judgments included, into which it effectively enters. But this is said only of fraud properly alleged and duly shown in a proper proceeding. A court of law may set aside its own judgments obtained by fraud upon itself, but not for fraud practiced only upon the adverse party, when he has had his day in court, or his opportunity, to have it or has waived it, and his adversary has obtained judgment on competent evidence however false and fraudulent.”

It would seem, then, from a consideration of these leading cases and the host of precedents which follow them³² that the law is clearly established that a judgment of a court having

²⁹ The case referred to is *Crawford v. Crawford*, 4 De Sau. 176 (S. C. 1811).

³⁰ 12 Mont. 122 (1892).

³¹ 64 Ill. App. 73 (1895).

³² *Supra*, see notes 7 and 10.

jurisdiction over the subject matter and the parties cannot be questioned collaterally for fraud by evidence of facts *aliunde* the record by the parties or their privies.

But to this rule there seem to be several clear exceptions founded upon reason as well as upon authority. The rule being based upon the reasoning in *Moses v. Macferlan*³³ to the effect that the merits of contested cases may never again be "over-haled," it is but consistent to predicate (as was indicated in the *dicta* in *United States v. Throckmorton*)³⁴ that where the fraud resides in a matter which has not been adjudicated by the judgment put in issue, it may be made the basis of a collateral attack.

The exception is a recent development. The earliest case wherein the distinction is drawn is *Daniels v. Benedict*³⁵ decided in 1892 by the United States Circuit Court in Colorado. The plaintiff, a widow, brought a suit for partition, alleging that she and her deceased husband had agreed that he should secure a divorce on the ground of desertion, but that he had sued on the ground of adultery, a fact that she had not learned until after the decree had been entered. It was held that the plaintiff had a cause of action, for the fraud was extrinsic to the matters contained in the record and by reason of it the parties were not in *pari delicto*.³⁶ Whatever may be said of the exception thus stated, it is fairly clear that the case before the court was not one for the application of it.

In *Ward v. Southfield*³⁷ the defendant did not disclose his case and obtained judgment. When the plaintiff found out that he had been duped, he moved to set aside the judgment. While this was not a collateral attack, Earl, J., treated it as if it were and said:³⁸

³³ 2 Burrows 1005-1008 (1760).

³⁴ 98 U. S. 61 (1878).

³⁵ 50 Fed. 347. The decision was probably based on the *dictum* in U. S. v. *Throckmorton*, *supra*.

³⁶ See *Davis v. Davis*, 61 Me. 395 (1873), where the libellant was not allowed to plead her own collusion in a divorce case to avoid the effect of the decree.

³⁷ 102 N. Y. 287.

³⁸ 102 N. Y. 292.

"But where the fraud is not the subject of litigation, not any thing which was in the issues tried, but fraud practiced upon a party or the court during the trial or in prosecuting the action, or in obtaining the judgment it may be attacked collaterally and on account thereof set aside and vacated. But before a regular judgment can be assailed, the proof should be clear and very satisfactory."

It was not until the case of *Justice v. Georgia Realty Company*³⁹ that the exception under consideration was clearly stated in language pertinent to the point of law at issue. Justice owned an island in the James River opposite Richmond which the Trigg Shipbuilding Company wanted to buy, but Justice refused to sell. The Shipbuilding Company and the City of Richmond agreed that the latter should take the island by eminent domain and then exchange it to the Shipbuilding Company for other lands owned by the latter. This was done, and after Justice's death his widow brought a bill in equity to set aside the decree of condemnation on the ground of fraud, and to assign her dower. The widow had not been a party to the proceeding attacked, but there undoubtedly was privity.⁴⁰ The case is clearly one of collateral attack, for the purpose of this bill was the assignment of dower; the setting aside the decree of condemnation was incidental. Whittle, J., thus states the exception:

"The rule with regard to the distinction between cases in which judgments may and those in which they may not be impeached collaterally for fraud is stated thus: They may be impeached by facts involving fraud or collusion but which were not before the court or involved in the issue or matter upon which the judgment was rendered. They may not be impeached for any facts whether involving fraud or collusion or not or even perjury which were necessarily before the court and passed upon."⁴¹

³⁹ 109 Va. 366 (1909).

⁴⁰ The court relied on *Mahoney v. Insurance Company*, 133 Iowa 570 (1907), but neither that case nor *Jackson v. Wilkerson*, 160 Fed. 623 (1908), is a clear disquisition on the exception under consideration.

⁴¹ There are several cases in which the converse of this proposition has been stated, *Hatch v. de la Garza*, 22 Tex. 176 (1858); *Finley v. Houser*, 22 Ore. 562 (1892); *Turney v. Van Gelder*, 18 N. Y. Supp. 547 (1892); *Trogdon v. Cleveland Stone Company*, 53 Ill. App. 206 (1893); *Nevitt v. First National Bank*, 91 Hun 43 (N. Y. 1895), and several *dicta*, such as that in *Crouse v. McVicker*, 207 N. Y. 213 (1912), but the cases in the text are the clearest of them all.

A second exception to the rule is to be found in cases in which the fraud is practiced not upon the defendant but upon the court. There are a number of *dicta* declaring this exception,⁴² but there seems to be only one case in which the point was decided.

In *Cook v. Town of Morris*,⁴³ A was appointed conservator of B and kept him out of his, B's estate. A settled his accounts in the probate court showing B indebted to him, and then brought suit against the two for the support of B as an alleged pauper. The town was permitted to show that the decree of the probate court had been obtained by fraud on the court. The case, however, is weakened by a loose remark by Chief Justice Andrews that "a probate record may always be impeached for fraud."⁴⁴

A third exception is to be found in cases where the judge has been corrupted. It was said in *Locket v. Gross*:⁴⁵

"It is true that if it can be shown that the judge, in granting the injunction, was influenced by corrupt motives that fact will avoid the bar which the judgment would otherwise afford, provided the corruption was induced either directly or indirectly by the party in whose favor the injunction was granted, for no matter how prejudiced or biased a judge may have been against the losing party or his counsel, the prevailing party could not be held responsible or liable therefor if he did nothing toward producing the prejudice or bias by which the judge was affected."

In *Burkhart v. Stephens*⁴⁶ it was held that it makes no difference who corrupted the judge if he was corrupt, whereas, in *Kirby v. Kirby*⁴⁷ it was said that if the judge was corrupt the judgment cannot be attacked.

These exceptions are founded upon principle, but there are

⁴² *Bowman v. Wilson*, 64 Ill. App. 73 (1895); *Kirby v. Kirby*, 142 Ind. 419 (1895); *Mandeville v. Reynolds*, 68 N. Y. 528 (1877), where it was said: "Judgment obtained by fraud upon the court binds not such court or any other, and its nullity upon that ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding."

⁴³ 66 Conn. 137 (1895).

⁴⁴ See *Eysaman v. Nelson*, 79 Misc. 304 (N. Y. 1913).

⁴⁵ 8 Ga. App. 772 (1910).

⁴⁶ 117 Mo. App. 425 (1905).

⁴⁷ 142 Ind. 419 (1895).

two cases that recognize the general rule but base exceptions to it upon the character of the judgment attacked, a matter which seems arbitrary.

In *Johnson v. Girwood*⁴⁸ it was held that a judgment of "Guilty" obtained by confession in a criminal court may be attacked by the defendant on the ground of fraud.

In *United States v. Chung Shee*⁴⁹ it was said that a decree remanding a prisoner to custody, upon a writ of *habeas corpus*, is not the subject of the rule of *res adjudicata*.

But it has already been noticed that the decisions in cases involving only facts covered by the general rule are not uniform. Black in his Treatise on Judgments⁵⁰ limits the showing of fraud by parties and privies to Pennsylvania, South Carolina and New Hampshire. To this we must add Kentucky, and further state that there are cases in North Carolina, Indiana, Iowa, Texas and England which seem to be irreconcilable with the overwhelming weight of authority in those jurisdictions.

The Pennsylvania cases are the most numerous and the most interesting. It is doubtful to which side Pennsylvania belongs. The earliest case seems to be *Hall v. Hamlin*⁵¹ in which A brought ejectment against B, who held title by virtue of a sheriff's sale. The plaintiff offered to show that the judgment upon which the sale was made was void because obtained by fraud. The lower court ruled out the evidence. Its judgment was reversed. This is very clearly a case of permitting a collateral attack. It cannot be said to fall within any of the exceptions noted.

In *Mitchell v. Knitzer*⁵² the defendant's husband took title to certain of her lands, in the partition of an estate in which she was entitled to a purpart, without any consideration. He then fraudulently confessed judgment, and upon execution the lands were sold to the plaintiff, who brought ejectment. An offer to prove these facts was refused. Judgment was reversed.

⁴⁸ 7 Misc. 651 (N. Y. 1894), affirmed 143 N. Y. 660.

⁴⁹ 71 Fed. 277 (1895).

⁵⁰ Section 290. See notes 334 and 335.

⁵¹ 2 Watts 354 (Pa. 1834).

⁵² 5 Pa. 216 (1847).

In *Jackson v. Summerville*,⁵³ however, a contrary tendency appears. A obtained a deed of an undivided interest from B by fraud, secured judgment in partition and received his pur-part. Then B. died and his widow and children brought ejectment. Coulter, J., said: "The principle that judgments and decrees of courts procured by actual fraud are null to the extent of the fraud, as against the party defrauded is as old as the time of Lord Coke and is familiar in our own jurisprudence," but he omitted to state that the case from the Reports to which he refers was one in which an entire stranger to the record had sought to have the judgment declared void as to him. Justice Coulter took great pains to say that no judgment has declared the deed from Summerville to Jackson was not obtained by fraud.

In *Hageman v. Salisberry*⁵⁴ the court in a very brief opinion reverses the rule thus three times declared, without referring to the previous cases. A gave B a bond which B entered up, and sold land under the judgment to C, who conveyed to the defendant. A's heirs at law, after his death, brought ejectment and sought to show that the signature to the bond was a forgery. Mr. Justice Mercur said:

"If a judgment be confessed by an attorney, neither his authority nor the regularity of the judgment can be inquired into in a collateral action. Where he appears without authority and confesses judgment, the remedy is against him, or, in a proper case, the court in which it was entered may open the judgment."

This ruling was confirmed in *Otterson v. Middleton*.⁵⁵ A bequeathed to B, who assigned his legacy to C, but D attached it in the hands of the executors. The Orphans' Court decided in favor of C, but D proceeded with his attachment in the Common Pleas. The garnishee offered the Orphans' Court record in evidence and the plaintiff offered to show that the decree was obtained by fraud. Green, J., said:

⁵³ 13 Pa. 359 (1850).

⁵⁴ 74 Pa. 280 (1873).

⁵⁵ 102 Pa. 78 (1883).

"We have, then, the case of a decree of a court of competent jurisdiction in a proper proceeding, after hearing, argument and decision upon the same issue, now raised, and between the same parties now contending and we are clearly of opinion it is conclusive upon those parties until reversed on appeal or opened and set aside by the court which made it, upon application for that purpose."

In *Ogle v. Baker*⁵⁶ the new rule was still further fortified. That case was an action of trespass for that the defendant, by fraud, obtained a judgment against the plaintiff and collected it by attachment execution. McCullom, J., said:

"The general rule is that money collected or paid upon execution cannot be recovered back unless the judgment on which the writ issued is first vacated or reversed. . . . If it be conceded that the averments of the appellee are true, her appropriate remedy was an application to open the judgment."

The next case, however, is the other way. In *Phelps v. Benson*,⁵⁷ A and B agreed that A would bid in a property exposed to Orphans' Court sale and that if he bid it in and B did not bid, A would pay B's judgment lien on the property. The case is badly reported. Practically the entire opinion, which is *per cur.*, is as follows: "As a general rule, the records and decrees of the Orphans' Court cannot be impeached in a collateral proceeding. An exception to the general rule is when it is alleged that the decree was obtained by fraud."

McClain's Appeal,⁵⁸ however, goes back to the general rule. In that case the claimant sued the executor of an estate in the Common Pleas on an obligation of the decedent, and recovered a judgment. On the audit of the executor's account in the Orphans' Court, the claimant rested on his judgment, which the executors sought to show had been obtained by fraud. This the court refused to allow.

*Gazzam v. Reading*⁵⁹ is not a case of collateral attack, because it was a direct application to avoid the judgment, made in

⁵⁶ 137 Pa. 378 (1890).

⁵⁷ 161 Pa. 418 (1894).

⁵⁸ 180 Pa. 231 (1897).

⁵⁹ 202 Pa. 231 (1902).

the very case in which the judgment was rendered. It is the very case in which the judgment was rendered. It is treated by the court, however, as a collateral attack and denied. The matter is unworthily handled.

While the decision of *West Homestead Borough v. Erbeck*⁶⁰ does not rest upon the point we are considering, it is there said *obiter*, "The gist of this complaint is this fraud, and in the face of such a charge, if made and sustained, even in a collateral proceeding, neither record, award, judgment or decree will furnish shelter to the wrongdoer."

In this state of the cases it is almost impossible to prognosticate what rule the Supreme Court of Pennsylvania will adhere to when next the question of collateral attack upon a judgment, on the ground of fraud, comes before it. We can find no theory or distinction by which to reconcile the cases, unless we make each case authority for its own facts by drawing absolutely arbitrary distinctions.⁶¹

Of the Kentucky cases *Ellis v. Kelley*⁶² is the broadest. A, by fraud, obtained judgment against B and collected. Then B discovered the fraud and sued A. He was allowed to recover the money.⁶³

The cases in South Carolina follow those in Kentucky⁶⁴ and so does *State v. Little*, the New Hampshire case on this point.⁶⁵

⁶⁰ 230 Pa. 316 (1911).

⁶¹ In the midst of such a plethora of Supreme Court precedent, the county court case of *Bank v. Kern*, 8 Pa. Dist. 75 (1899), following the general rule, needs only to be mentioned.

⁶² 8 Bush 621 (Ky. 1871).

⁶³ See also *Faris v. Durham*, 5 T. B. Mon. 397 (Ky. 1827); *Thomas v. Ireland*, 88 Ky. 581 (1889); *First National Bank v. Cunningham*, 48 Fed. 510 (1891), by the United States Court applying the Kentucky law, and *Ft. Jefferson Improvement Co. v. Greene*, 65 S. W. 161 (Ky. Ct. of Appeals 1901).

⁶⁴ *Crawford v. Crawford a De Saussre*, 176 (S. C. 1811); *Sullivan v. Ball*, 55 S. C. 345 (1899). But see, *Norton v. Wallace*, 2 Rich. L. 460 (S. C. 1845).

⁶⁵ 1 N. H. 257 (1818), to the same effect as *Great Falls v. Worcester*, 45 N. H. 110 (1863), but *Blanchard v. Webster*, 62 N. H. 467 (1883), is flatly to the effect that the probate decree attacked was binding on all the world. It is true the decree was forty years old.

It would seem from an examination of these cases that the general rule as we have laid it down is not applicable in the States of Kentucky, South Carolina and New Hampshire, but that a judgment may be collaterally impeached for fraud in those jurisdictions.

There are sporadic cases in other states inconsistent with the general rule. We will examine these cases with greatest care to ascertain if they can be distinguished.

*Houser v. Bonsall*⁶⁶ arose because the plaintiff's father had brought a suit as next friend of his minor son, recovered a judgment for the very injuries the plaintiff sued for, and collected. The Superior Court threw out the plaintiff's suit because of the prior judgment, refusing to hear it attacked on the ground of fraud. This was reversed. While the court said that an independent action under the code to vacate the judgment was the only proper remedy, the parties all being before the court, the attack was treated as a bill in equity to set the judgment aside. This appears to be quite possible under North Carolina practice, and the case cannot, therefore, be said to be really inconsistent with the other North Carolina precedents.⁶⁷

*Pfiffner v. Krapfel*⁶⁸ presents an unusual feature. A obtained judgment against B by inducing her to accept service of the writ, fraudulently concealing the purport of her act. Then he obtained judgment and sold B's land to C. The land was then sold for taxes, and B redeemed it and brought ejectment against C, who was in possession. The court rendered judgment for B, but does not seem to have been cognizant of the fact that thereby they permitted a judgment to be impeached in a collateral proceeding. Very little reliance could be

⁶⁶ 149 N. C. 52 (1908).

⁶⁷ "It is settled by a long and uniform line of decisions of this court that a final judgment can be attacked for fraud in its procurement only by an independent action (for that purpose only), *Fowler v. Poor*, 93 N. C. 466; *Syme v. Trice*, 96 N. C. 243; *Buckhouse v. Sutton*, 99 N. C. 103; *Smith v. Fort*, 105 N. C. 446." *Lanier v. Heiling*, 140 N. C. 384 (1908). *Earp v. Minton*, 138 N. C. 202 (1905); *Carter v. Roundtree*, 109 N. C. 29 (1891), but see *Glover v. Flowers*, 101 N. C. 134 (1888).

⁶⁸ 28 Iowa 27 (1869).

placed on the weight of this decision as a precedent, in view of the other Iowa cases.⁶⁹

In *Cotterell v. Koon*,⁷⁰ the court disposed of the question of collateral attack by saying that fraud of itself is a direct attack, a proposition we have already commented upon.⁷¹ The other Indiana cases do not follow this ruling.

In *Hutchinson v. Lockett*,⁷² the plaintiff first brought a suit for specific performance and paid \$150, the purchase money, into court. Then he withdrew the purchase money, which avoided his suit. He then entered judgment by default against the defendant. Subsequently, he brought an action of trespass to try the title, and offered his fraudulent judgment in evidence. The court said: "That a judgment rendered in a court of competent jurisdiction cannot be attacked in a collateral proceeding is a rule of almost universal application. Nevertheless, a judgment may be impeached in any proceeding upon the ground of fraud or satisfaction. It is said this rule may be applied to judgments affected by fraud, whether the fraud arises before, at the time of or after the rendition of the judgment. The court has only to determine that a judgment is founded in fraud to authorize its impeachment as a nullity," all of which was perfectly gratuitous, for the case is clearly within the second exception to the general rule as above stated. The fraud was a fraud upon the court, which never would have permitted a judgment by default to have been entered had it been made to appear that the purchase money had been withdrawn. The wording quoted is therefore mere *dictum*.⁷³

⁶⁹ See *Telford v. Barney*, 1 Greene 575 (Iowa 1848); *Mason v. Messinger*, 17 Iowa 261 (1864); *Smith v. Smith*, 22 Iowa 516 (1897); *Edmundson v. Jackson School District*, 98 Iowa 639 (1896); *Mahoney v. Insurance Company*, 133 Iowa 570 (1907); *Gilman v. Heitman*, 137 Iowa 336 (1908); *Lang v. Dunn*, 145 Iowa 363 (1910). But see *Corwin v. Toole*, 31 Iowa 513 (1871); *Whetstone v. Whetstone*, 31 Iowa 276 (1871), and *Warthen v. Heimstreet*, 112 Iowa 605 (1900).

⁷⁰ 151 Ind. 182 (1898).

⁷¹ *Supra*, note 3. *Accord*, *Kirby v. Kirby*, 142 Ind. 419 (1895); but see *Cline v. Murrell*, 9 Ind. 516 (1857); *Weiss v. Gourneau*, 109 Ind. 438 (1886); *Mannix v. State*, 115 Ind. 245 (1888); *Schultz v. Schultz*, 136 Ind. 323 (1893); *Oster v. Broe*, 161 Ind. 113 (1903); *Young v. Wiley*, 107 N. E. 278 (Ind. 1914).

⁷² 39 Tex. 165 (1873).

⁷³ And see *Hatch v. de la Garza*, 22 Tex. 176 (1858); *Storer v. Lane*,

The English case of *Cole v. Langford*,⁷⁴ however, presents much greater difficulties. The fraud there presented was nothing but perjury in the evidence offered at the previous trial, yet the Queen's Bench Division was so clear that the judgment should be set aside that they rendered no opinion.

The Canadian case of *Rodgers v. Porter*⁷⁵ seems to be a direct reflection of the decision in the mother country. The facts of the case present the familiar attempt by the defendant, after having suffered the collection of a fraudulent judgment, suing to recover the money so collected. The court breezily remarks that such a rank injustice as that presented to it by the evidence could not be tolerated and permits the recovery. No precedents are relied upon.

Either *Moses v. Macferlan*⁷⁶ or *Cole v. Langford*⁷⁷ is wrong. Both cannot be the law. To the commentator there can be but one choice when the pregnant words of Lord Mansfield are weighed against the decision (without opinion) of the Queen's Bench Division of 1898. To the counsellor the two cases spell caution, and to the advocate, confusion.^{77a}

Foreign Judgments.

So far we have considered only cases dealing with domestic judgments. It seems, on principle, that the case of a judgment of one of the United States should receive treatment in the

⁷⁴ Tex. Civ. App. 260 (1892); *Grant v. Hill*, 30 S. W. 952 (Tex. 1894); *Irwin v. Bexar County*, 63 S. W. 550 (Tex. 1901); *White v. Bedell*, 173 S. W. 624 (Tex. 1915).

⁷⁵ L. R. 2 Q. B. (1898) 36.

⁷⁶ 37 New Brunswick 235 (1905).

⁷⁷ *Supra.*

^{77a} *Supra.*

^{77a} The case of *Wyatt v. Palmer* L. R. 2 Q. B. (1899), 106, follows *Cole v. Langford*. The question is rendered more or less immaterial because of the presence of another element in the case, but the remarks of Lindley, M. R., are worthy of comment. He says (p. 109): "Thereupon the plaintiff brings an action to impeach that judgment on the ground that it was obtained by fraud. It is said that no such action will lie. That proposition is so new to me that, as an equity lawyer, I was startled by it. That an action could not be brought to impeach a decree or judgment on the ground of fraud was a surprise to me."

courts of a sister state analogous to that accorded a domestic judgment. Foreign judgments might be more frequently open to attack upon the ground of lack of jurisdiction; but that is a question beyond the scope of the article. The cases, however, make a slight distinction in treating foreign judgments. The point is worthy of brief notice, and there are but six cases. They are by no means reconcilable. Five are to the effect that fraud cannot be shown, while one is the other way.

In *Benton v. Burgot*⁷⁸ the Supreme Court of Pennsylvania decided that the judgment of another state's courts cannot be attacked by fraud.

In *Anderson v. Anderson*⁷⁹ the conclusion was reached that a foreign judgment could be attacked only by a proceeding in equity.

In *Field v. Sanderson*⁸⁰ the general rule was applied without much consideration. The cause of complaint was perjury.

In *McRae v. Mattoon*⁸¹ the court could find no distinction from *Homer v. Fish*,⁸² where the judgment attacked was domestic.

In *Dunlap v. Byers*,⁸³ after an elaborate and lucid discussion, it was resolved that a decree in the equity court of one state is binding on the consciences of the parties even in another state's courts and cannot be attacked on the ground of fraud.

The case on the other side is much more elaborately considered. In *Murray v. Murray*⁸⁴ the question was the legal effect in Oregon of a decree of divorce rendered in Indiana. It was said:

"If a party seeks a benefit under a judgment or decree of a superior court of a sister state, in an action where such judgment cannot be pleaded, as in this case, being an action to recover real property under our statute, he may offer it in evidence and inas-

⁷⁸ 10 S. & R. 240 (Pa. 1823), and see also *Bank v. Fries-Breslin Co.*, 214 Pa. 395 (1906).

⁷⁹ 8 Ohio 108 (1837).

⁸⁰ 34 Mo. 542 (1864).

⁸¹ 13 Pick. 53 Mass. (1832).

⁸² 1 Pick. 435 (Mass. 1823).

⁸³ 110 Mich. 109 (1896).

⁸⁴ 6 Oregon 17 (1876).

much as his adversary has had no opportunity to attack it in our own court by a direct proceeding and should not be required to go into a foreign state to attack it and impeach it by evidence of want of notice to the party and by evidence of fraud in procuring it; notwithstanding such decree or judgment may, by its recitals appear regular and show jurisdiction.”⁸⁵

The case affords on close study a most excellent example of the misapplication of the doctrine of public convenience.

From all the precedents we may conclude that except in the jurisdictions already pointed out whether the judgment in question be domestic or foreign, it is conclusive as to all matters determined by it if the court had jurisdiction of the persons and the *res*, and the record is regular on its face; at least so far as parties and privies are concerned. Only in cases where fraud is alleged to exist in a matter not litigated, or was perpetrated on the court or by the court, is there room for a collateral attack.

ATTACK BY THIRD PARTIES.

Having thus concluded our examination of the cases dealing with parties and privies, we have now to turn to the second portion of our inquiry, attack by third parties.

We will find the rules here comparatively simple and almost universally accepted. For the sake of precision only it may be well to divide third parties into two classes: creditors and others.

A judgment given by collusion between the debtor and the plaintiff in such judgment for the purpose of hindering and delaying creditors may be collaterally attacked by the creditors intended to be defrauded.⁸⁶ But the fraud which will justify

⁸⁵ *Quære* how far this contravenes the “full faith and credit” cause of the Federal Constitution? See *Christmas v. Russell*, 5 Wall. 290 (U. S. 1866).

⁸⁶ *Lowber's Estate*, 8 W. & S. 387 (Pa. 1845); *obiter*, *Woodward v. Schmidt*, 5 Phila. 152; *Brown v. Ahl*, 29 Pa. 357 (1857); *Spicer v. Waters*, 65 Barb. 227 (N. Y. 1866); *Thompson's Appeal*, 57 Pa. 175 (1869); *Clark v. Douglas*, 62 Pa. 408 (1869); *Smith v. Henderson*, 23 La. Ann. 649 (1871); *Second National Bank of Titusville's Appeal*, 85 Pa. 528 (1877); *Shallcross v. Deats*, 43 N. J. Law 177 (1881); *Meckey's Appeal*, 102 Pa. 536 (1883); *Richardson v. Trimble*, 38 Hun 409 (N. Y. 1886); *Stark's Appeal*, 128 Pa. 545 (1889); *Northern Pacific v. Boyd*, 177 Fed. 804 (1910); *Bole v.*

such an attack must be fraud designed to injure the attacking creditors or at least such as directly affects their interests. Fraud practiced upon the debtor only is not sufficient.⁸⁷ But such an attack does not impair the obligation of the judgment between the original parties upon whom it is binding. A fraudulent judgment like a fraudulent deed, is good as against all but the interests intended to be defrauded thereby.

Substantially the same rule applies to collateral attack by other third parties. A stranger to the record may always impeach a judgment which stands in his way by plea and proof of fraud in obtaining it, for it is his only means of availing himself of the fraud.⁸⁸ But, like a creditor, he must show rights and claims which would be prejudiced by the enforcement of the judgment⁸⁹ and which accrued prior to its rendition.⁹⁰ Thus, where a purchaser at sheriff's sale of a property which was subject to a judgment which had been recovered by means of fraud, sought to attack the judgment, it was held that as his rights

Belden, 239 Pa. 1 (1912); Wenatchee v. Stafford Orchard Company, 205 Fed. 964 (1913); Blau v. Bernagozzie, 54 Pa. Superior Court 111 (1913). But in Parker v. Waugh, 34 Mo. 340 (1864), where A levied an execution but left the goods seized in the possession of the execution defendant, it was held that the transaction was presumptively fraudulent as against a subsequent execution creditor.

⁸⁷ Dougherty's Appeal, 9 W. & S. 180 (1845); Drexel's Appeal, 6 Pa. 272 (1847); Lewis v. Rodgers, 16 Pa. 18 (1851); Hackett v. Manlove, 14 Cal. 85 (1859); De Armond v. Adams, 25 Ind. 455 (1865); Miners Trust Company v. Roseberry, 81 Pa. 309 (1876); Sheetz v. Hanbest, 81 Pa. 100 (1876); McAlpine v. Sweester, 76 Ind. 78 (1881); Hanika's Estate, 138 Pa. 330 (1890); Zug v. Searight, 150 Pa. 506 (1892); Safe Deposit Company v. Wright, 105 Fed. 155 (1900).

⁸⁸ Dutchess v. Kingston's Case, 20 How. St. Trials 355 (Eng. 1776); Crosby v. Lang, 12 East 409 (Eng. 1810); Atkinson v. Allen, 12 Vt. 619 (1839); Downs v. Fuller, 2 Met. 135 (Mass. 1840); Williams v. Martin, 7 Ga. 377 (1849); Cline v. Murrell, 9 Ind. 516 (1857); *obiter*, Great Falls v. Worcester, 45 N. H. 110 (1863); *obiter*, Sidenspacker v. Sidenspacker, 52 Me. 481 (1864); Smith v. Cutler, 78 Ga. 654 (1887); Bradley v. Reynolds, 61 Conn. 271 (1892); Ogle v. Baker, 137 Pa. 378 (1890); Cook v. Town of Morris, 66 Conn. 137 (1895); Morris v. Sadler, 74 Kan. 892 (1906). But see Grant v. Hill, 20 S. W. 952 (Tex. 1894), and Childs v. Ham, 23 Me. 74 (1843).

⁸⁹ Meeker v. Williamson, 8 Martin 365 (La. 1820); Miners Bank v. Roseberry, 81 Pa. 309 (1876).

⁹⁰ Lewis v. Peterkin, 39 La. Ann. 780 (1887); Morris v. Sadler, 74 Kan. 892 (1906).

would not be prejudiced by the enforcement of the judgment he could not attack the judgment.⁹¹

These rules are very simple in comparison with those applying to parties and privies. The question who is a privy has been much disputed,⁹² but that is a question not within the scope of this inquiry.

Philadelphia.

Graham C. Woodward.

⁹¹ *Miners Bank v. Roseberry*, 81 Pa. 309 (1876). But note the distinction in *Hogg v. Link*, 90 Ind. 346 (1883), where the plaintiff had paid for the property as if there had been no judgment and was allowed to attack.

⁹² See, for example, *Bridgeport Insurance Company v. Wilson*, 34 N. Y. 275 (1866); *Tuthill v. Smith*, 90 Iowa 331 (1894).